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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MARLA CASTLEMAN,

Plaintiff,

vs.

PROFESSIONAL RECOVERY
SERVICES, INC.,

Defendant.

Case No. CV-10-280-JLQ

MEMORANDUM IN SUPPORT OF
DEFENDANT PROFESSIONAL
RECOVERY SERVICES' MOTION
FOR SUMMARY JUDGMENT

1. Summary of Argument

Defendant Professional Recovery Service, Inc. (PRS) is entitled to summary judgment because Plaintiff cannot prove any claim for relief against them.

Alternatively, if any violation of the FDCPA occurred, it was unintentional, and resulted from a bona fide error notwithstanding procedures to avoid the error.

2. Points and Authorities

a. Background.

MEMORANDUM IN SUPPORT OF DEFENDANT PROFESSIONAL RECOVERY
SERVICES' MOTION FOR SUMMARY JUDGMENT - 1
Case No. CV-10-280-JLQ

1 PRS is a collection agency.

2 Resurgent Capital Services LP (Resurgent) is a debt buyer.

3 Citicorp Credit Services Inc. (Citicorp) was the debt seller.

4 The Palmer Firm, PC (Palmer Firm) is an attorney firm located in Rancho
5 Cucumunga, California. It does debt management for debtors.

6 On or about 5/21/09, PRS was assigned an account against Marla Castleman
7 (Castleman) by Resurgent based on a purchased credit card debt in the sum of
8 \$1,622.90. The last payment date was indicated to be 9/26/08, and the last
9 payment amount was indicated to be \$1,095.63. The debt was incurred on a Sears
10 Mastercard which was managed by Citicorp.

11 On or about 5/21/09, a demand letter was sent to Castleman by PRS with the
12 disclosures required under the Fair Debt Collection Practices Act, 15 USC §
13 1692g. There was no written response to this demand letter at any time.

14 On or about 6/6/09, Castleman called PRS. Castleman indicated to PRS that
15 her account had been settled by Palmer Firm. She gave a phone number for
16 Palmer Firm of (800) 560-8520. This was the only communication with
17 Castleman.

18 PRS was initially unsuccessful in reaching Palmer Firm on 7/23/09 and
19 7/30/09.

20 On or about 8/24/09, PRS communicated with Palmer Firm. The Palmer
21 Firm said they needed a letter from PRS showing the Palmer Firm that PRS had the
22 account. PRS faxed the letter attached to the complaint as Exhibit C to the Palmer

1 Firm at (909) 581-7317. Exhibit C was never mailed to Castleman, and was not
2 sent to Castleman in any form except through the fax to the Palmer Firm.

3 On or about 8/31/09, PRS contacted the Palmer Firm, and the Palmer Firm
4 acknowledged receipt of the fax, and indicated they would be mailing PRS a letter.

5 On or about 9/11/09, PRS received information from the Palmer Firm that
6 showed that the account was settled on 9/24/08. PRS canceled the account based
7 upon receipt of this information from the Palmer Firm.

8 On 8/23/10, Castleman filed this complaint against PRS.

9 On 10/26/10, the Court entered an Order requiring Plaintiff to file is final
10 witness list on or before 2/1/11 [Doc. 10]. The Court stated that “Only listed
11 witnesses may testify.”

12 Plaintiff failed to file and serve a final witness list on or before 2/1/11. As a
13 result, Plaintiff has no evidence of liability by PRS.

14 As a result, PRS is entitled to summary judgment based on Castleman’s
15 failure to have any witnesses to prove Castleman’s allegations.

16 **b. Preliminary statement about the FDCPA.**

17 The purpose of the FDCPA is “... to eliminate abusive debt collection
18 practices by debt collectors, to insure that those debt collectors who refrain from
19 using abusive debt collection practices are not competitively disadvantaged, and to
20 promote consistent State action to protect consumers against debt collection
21 abuses.” 15 USC § 1692 (e).
22

1 The purpose of the FDCPA, to provide information that helps consumers to
 2 choose intelligently, would not be furthered by creating liability as to immaterial
 3 information because by definition immaterial information neither contributes to
 4 that objective (if the statement is correct) nor undermines it (if the statement is
 5 incorrect). *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th.Cir. 2010).

6 A complaint for violation of the FDCPA must be commenced within one
 7 year of the date of the violation. 15 USC § 1692k (d).

8 Communications directed only to a debtor's attorney, and unaccompanied by
 9 any threat to contact the debtor, are not actionable under the Act. *Guerrero v. RJM*
 10 *Acquistions LLC*, 499 F.3d 926, 936 (9th Cir. 2007); See accord *Medialdea v. Law*
 11 *Office of Evan L. Loeffler PLLC*, 2009 US Dist. LEXIS 93054 (W.D.Wash. 2009).

12 The only communication with Castleman within one year of the date of the
 13 alleged violation was the letter faxed to the Palmer Firm on 8/24/09. This letter
 14 (without the cover sheet) is attached to the complaint as Exhibit C.

15 **c. Allegation made in Paragraph 11 (a) of the Plaintiff's Amended**
 16 **Complaint [Doc. 5].**

17 (a) Communication with the consumer generally
 18 Without the prior consent of the consumer given directly to the debt
 19 collector or the express permission of a court of competent
 20 jurisdiction, a debt collector may not communicate with a consumer in
 21 connection with the collection of any debt - ...

22 (2) if the debt collector knows the consumer is represented by an
 attorney with respect to such debt and has knowledge of, or can
 readily ascertain, such attorney's name and address, unless the
 attorney fails to respond within a reasonable period of time to a
 communication from the debt collector or unless the attorney consents
 to direct communication with the consumer; ... 15 USC § 1692c
 (a)(2).

1 The only communication with the consumer within the FDCPA statute of
2 limitations was a communication to Castleman's attorney, the Palmer Firm, on
3 8/24/09.

4 PRS never spoke to Castleman after 6/6/09, and the case was filed on
5 8/23/10.

6 Further, PRS did not "know" that Castleman was represented by an attorney
7 when PRS contacted Castleman on 6/6/09. Castleman informed PRS of the Palmer
8 Firm's representation on 6/6/09.

9 As a result, PRS is entitled to summary judgment dismissing Castleman's
10 claim in paragraph 11 (a).

11 **d. Allegation made in Paragraph 11 (b) of the Plaintiff's Amended**
12 **Complaint [Doc. 5].**

13 A debt collector may not use any false, deceptive, or misleading
14 representation or means in connection with the collection of any debt. ... 15 USC
15 § 1692e.

16 A false and misleading representation includes the false representation of the
17 character, amount, or legal status of any debt. 15 USC § 1692e (2)(A).

18 A false or misleading statement is not actionable under § 1692e unless it is
19 material. Materiality is defined as "if a statement would not mislead the
20 unsophisticated consumer, it does not violate the [Act]—even if it is false in some
21 technical sense." *Donohue v. Quick Collect, Inc.*, 592 F.3d at 1033.

22 Communications directed only to a debtor's attorney, and unaccompanied by
any threat to contact the debtor, are not actionable under the Act. *Guerrero v. RJM*
Acquisitions LLC, 499 F.3d at 936.

1 The letter sent to the Palmer Firm was sent only to the Palmer Firm, and
2 only at the request of the Palmer Firm to prove to the Palmer Firm that PRS was
3 the holder of the debt.

4 There was no threat to contact the debtor.

5 Therefore, there is no cause of action under the FDCPA for the
6 communication with the Palmer Firm on 8/23/09 by PRS.

7 As a result, PRS is entitled to summary judgment dismissing Castleman's
8 claim in paragraph 11 (b).

9 **e. Allegation made in Paragraph 11 (c) of the Plaintiff's Amended
10 Complaint [Doc. 5].**

11 A debt collector may not use any false, deceptive, or misleading
12 representation or means in connection with the collection of any debt. ... 15 USC
13 § 1692e.

14 A false and misleading representation includes the false representation
15 of any services rendered or compensation which may be lawfully received
16 by any debt collector for the collection of a debt. 15 USC § 1692e (2)(B).

17 See the argument made in section 2d above.

18 There is no cause of action under the FDCPA for the communication with
19 the Palmer Firm on 8/23/09 by PRS.

20 As a result, PRS is entitled to summary judgment dismissing Castleman's
21 claim in paragraph 11 (c).

22 **f. Allegation made in Paragraph 11 (d) of the Plaintiff's Amended
Complaint [Doc. 5].**

1 A debt collector may not use any false, deceptive, or misleading
 2 representation or means in connection with the collection of any debt. ... 15 USC
 3 § 1692e.

4 A false and misleading representation includes the treat to take any action
 5 that cannot legally be taken or that is not intended to be taken. 15 USC § 1692e
 6 (5).

7 See the argument made in section 2d above.

8 There is no cause of action under the FDCPA for the communication with
 9 the Palmer Firm on 8/23/09 by PRS.

10 As a result, PRS is entitled to summary judgment dismissing Castleman's
 11 claim in paragraph 11 (d).

12 **g. Allegation made in Paragraph 11 (e) of the Plaintiff's Amended**
 13 **Complaint [Doc. 5].**

14 Sec. 1692g. Validation of debts –

15 (a) Notice of debt; contents

16 Within five days after the initial communication with a consumer in
 17 connection with the collection of any debt, a debt collector shall,
 18 unless the following information is contained in the initial
 19 communication or the consumer has paid the debt, send the consumer
 20 a written notice containing –

21 (1) the amount of the debt;

22 (2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after
 receipt of the notice, disputes the validity of the debt, or any portion
 thereof, the debt will be assumed to be valid by the debt collector;

1 (4) a statement that if the consumer notifies the debt collector in
2 writing within the thirty-day period that the debt, or any portion
3 thereof, is disputed, the debt collector will obtain verification of the
4 debt or a copy of a judgment against the consumer and a copy of such
5 verification or judgment will be mailed to the consumer by the debt
6 collector; and

(5) a statement that, upon the consumer's written request within the
thirty-day period, the debt collector will provide the consumer with
the name and address of the original creditor, if different from the
current creditor.

(b) Disputed debts

***If the consumer notifies the debt collector in writing within the
thirty-day period described in subsection (a) of this section*** that the
debt, or any portion thereof, is disputed, or that the consumer requests
the name and address of the original creditor, the debt collector shall
cease collection of the debt, or any disputed portion thereof, until the
debt collector obtains verification of the debt or a copy of a judgment,
or the name and address of the original creditor, and a copy of such
verification or judgment, or name and address of the original creditor,
is mailed to the consumer by the debt collector. Collection activities
and communications that do not otherwise violate this subchapter may
continue during the 30-day period referred to in subsection (a) unless
the consumer has notified the debt collector in writing that the debt, or
any portion of the debt, is disputed or that the consumer requests the
name and address of the original creditor. Any collection activities
and communication during the 30-dayperiod may not overshadow or
be inconsistent with the disclosure of the consumer's right to dispute
the debt or request the name and address of the original creditor.

Castleman obviously received PRS' first notice that was sent on 5/21/09
because Castleman called PRS on 6/6/09.

However, Castleman never communicated with PRS in writing.

Because Castleman did not dispute the debt ***in writing*** within 30 days of
PRS' first notice to Castleman, PRS was never obligated to verify the debt under
15 USC § 1692g.

1 As a result, PRS is entitled to summary judgment dismissing Castleman's
2 claim in paragraph 11 (e).

3 **h. Preliminary statement about the WCPA.**

4 To establish a claim under the Washington Consumer Protection Act, RCW
5 19.16.250 (WCPA), plaintiffs must prove five elements:

- 6 (1) An unfair or deceptive act or practice;
7 (2) Occurring in trade or commerce;
8 (3) Public Interest Impact;
9 (4) Injury to Plaintiffs' business or property; and
10 (5) Causation. First State Insurance Company v. Kemper National

11 Insurance Company, 94 Wash.App. 602, 608-9, 971 P.2d 953 (1999).

12 Damages for emotional distress are not recoverable for a violation of the
13 WCPA. Damages for emotional distress are generally limited to claims for
14 intentional torts. Johnson v. Cash Store, 116 Wash.App. 833, 68 P.3d 1099 (2003).

15 Whether a particular action gives rise to a WCPA violation is a question of
16 law. First State Insurance Company v. Kemper National Insurance Company, 94
17 Wash.App. at 609.

18 **i. Allegation made in Paragraph 15 (a) of the Plaintiff's Amended**
19 **Complaint [Doc. 5].**

20 RCW 19.16.250 (11) states:

21 "No licensee or employee of a licensee shall: ...
22

(11) Communicate with the debtor after notification in writing from an attorney representing the debtor that all further communication relative to a claim should be addressed to the attorney: ...”

“Licensee” means any person licensed under this chapter. RCW 19.16.100 (9).

A violation requires a licensee. The notice also must be to the licensee since the prohibitions relate to the notice to the licensee.

PRS is a licensee.

PRS did not receive any communication in writing from the Palmer Firm until 9/3/09.

PRS did not communicate with Castleman after 9/3/09.

As a result, there cannot be any violation of RCW 19.16.250 (11).

As a result, PRS is entitled to summary judgment dismissing Castleman’s claim in paragraph 15 (a).

j. Allegation made in Paragraph 15 (b) of the Plaintiff’s Amended Complaint [Doc. 5].

No licensee or employee of a licensee shall:

(12) Communicate with a debtor or anyone else in such a manner as to harass, intimidate, threaten, or embarrass a debtor, including but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of force or violence, by threats of criminal prosecution, and by use of offensive language. A communication shall be presumed to have been made for the purpose of harassment if:

(a) It is made with a debtor or spouse in any form, manner, or place, more than three times in a single week;

(b) It is made with a debtor at his or her place of

1 employment more than one time in a single week;
2 (c) It is made with the debtor or spouse at his or her place of
3 residence between the hours of 9:00 p.m. and 7:30 a.m. RCW
4 19.16.250 (12).

5 PRS communicated with Castleman one time plus its first notice required by
6 the FDCPA.

7 The only communication pleaded in the complaint is the August 24, 2009
8 letter that was actually sent to the Palmer Firm [Doc. 5, ¶10].

9 There is no allegation of any repeated communications with Castleman in
10 the Complaint.

11 The one communication cannot constitute a repeated communication that
12 violates the WCPA.

13 As a result, there cannot be any violation of RCW 19.16.250 (12).

14 As a result, PRS is entitled to summary judgment dismissing Castleman's
15 claim in paragraph 15 (b).

16 **k. Allegation made in Paragraph 15 (c) of the Plaintiff's Amended
17 Complaint [Doc. 5].**

18 No licensee or employee of a licensee shall:

19 (14) Communicate with the debtor and represent or imply that the existing
20 obligation of the debtor may be or has been increased by the addition of attorney
21 fees, investigation fees, service fees, or any other fees or charges when in fact such
22 fees or charges may not legally be added to the existing obligation of such debtor.
RCW 19.16.250 (14).

1 The only communication pleaded in the complaint is the August 24, 2009
2 letter that was actually sent to the Palmer Firm [Doc. 5, ¶10].

3 None of the representations associated with RCW 19.16.250 (14) are in the
4 Complaint, or in Exhibit C [Doc. 5-1, Exhibit C].

5 As a result, there cannot be any violation of RCW 19.16.250 (14).

6 As a result, PRS is entitled to summary judgment dismissing Castleman's
7 claim in paragraph 15 (c).

8 **I. Allegation made in Paragraph 15 (d) of the Plaintiff's Amended**
9 **Complaint [Doc. 5].**

10 No licensee or employee of a licensee shall:

11 (15) Threaten to take any action against the debtor which the licensee cannot
12 legally take at the time the threat is made. RCW 19.16.250 (15).

13 The only communication pleaded in the complaint is the August 24, 2009
14 letter that was actually sent to the Palmer Firm [Doc. 5, ¶10].

15 None of the representations associated with RCW 19.16.250 (15) are in the
16 Complaint, or in Exhibit C [Doc. 5-1, Exhibit C].

17 As a result, there cannot be any violation of RCW 19.16.250 (15).

18 As a result, PRS is entitled to summary judgment dismissing Castleman's
19 claim in paragraph 15 (d).

1 **3. Conclusion**

2 PRS is entitled to judgment as a matter of law against Castleman on
3 Castleman's claims against PRS.

4 DATED: February 3, 2011.

5 DAVENPORT & HASSON, LLP

6 s/ Jeffrey I. Hasson

7 Jeffrey I. Hasson, WSBA#23741

8 Attorney for PRS
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Certificate of Service

I hereby certify that on February 3, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Lisa Johnston-Porter, and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: _____.

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